Nos. 178 and 179

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 178

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

UNITED INSURANCE COMPANY OF AMERICA, ET AL.

No. 179

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 371 F. 2d 316 and is reprinted in the Joint Appendix herein ("A." hereinafter) at 1231. The Decision and Order of the National Labor Relations Board is re-

ported at 154 NLRB 38 (and at A. 1199) and includes the Trial Examiner's Decision (A. 1122).

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 1966. On March 16, 1967, Mr. Justice Clark signed an Order extending the time for the filing of a petition for a writ of certiorari to and including May 20, 1967. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1); and that of the Court below, under 29 U.S.C. § 160. The petition was filed on May 20, 1967. This Court granted the petition of the Insurance Workers International Union, AFL-CIO ("Union" hereinafter) in No. 179 on October 9, 1967, consolidating the case with No. 178, *National Labor Relations Board* v. *United Insurance Company of America*, involving the identical case below. 389 U.S. 815, A. 1245-1246.

QUESTIONS PRESENTED

1. May the National Labor Relations Board ("Board" hereinafter) find workers to be "employees" rather than "independent contractors" within the meaning of the National Labor Relations Act, 29 U.S.C. §§ 141 *et seq.* ("Act" hereinafter), when the Board has found facts such as are found and disclosed on this record as to the debit[1] insurance agents here involved—that they are not independent businessmen and do not own or operate their own businesses; that they are an integral part of their employer's organization and business; that they may be subject to physical supervision on their debits or in the em-

[1] The word "debit" is generally used to signify either the group of policyholders whose premiums have been assigned to the particular agent for collection and servicing, or the geographic area within which the bulk of those policyholders is concentrated.

ployer's office to which they are assigned as the employer directs; that they depend upon the employer for their livelihood and have no real individual bargaining power vis-a-vis the employer; that the employer unilaterally dictates the rates and manner of their compensation; that the employer reserves the right to hire them and fire them; that they may not transfer other policyholders among themselves and require their employer's approval as to many details of their work; and that they are subject to the right of control otherwise exercised and effectively reserved by their employer over how the work shall be done as well as what work shall be done?

2. If the answer to the foregoing question is in the affirmative and if the Board so finds, may a Court of Appeals refuse to enforce the Board's Order—and particularly on the ground that the Court believes that many of the controls which their employer imposes upon the agents are inherent in the employer's business?

STATUTORY PROVISIONS INVOLVED

The statutory provisions primarily involved are those of the Act. Pertinent excerpts from Sections 2(3), 7, 8(a)(1) and (5), and 10(e) and (f) of the Act are set forth in the Appendix, p. 1a, *infra*.

STATEMENT OF THE CASE

This case presents significant questions as to the interpretation and scope of the exception of "an independent contractor" from the definition of an "employee" entitled to the protection and coverage of the Act (Section 2(3), set out p. 1a, *infra*), in the context of a refusal to bargain case. On August 14, 1964, the

Board certified the Union in the appropriate bargaining unit of the debit insurance agents employed by the Respondent United Insurance Company of America ("Company" hereinafter), in its Districts in Baltimore City and Anne Arundel County, Maryland. Thereafter, the Company refused to bargain on the ground that these agents were "independent contractors" and not "employees" within the meaning of the Act; and the Board issued a Complaint charging the Company with violation of Sections 8(a)(1) and (5) of the Act, in sum, refusal to bargain. The factual record in this case was made in hearings before the Trial Examiner; witnesses were heard on seven hearing days on various hearing dates in December, 1964.

After detailed oral argument and Briefs, the Trial Examiner issued his Decision on May 13, 1965, discussing the pertinent facts involved and finding that these agents were employees and not independent contractors. 154 NLRB at 38-60, A. 1122-1183. In appraising the facts of record, the Trial Examiner declared, "Reliance will be placed on functions and requirements as carried out in actual performance * * *." 154 NLRB at 43, A. 1136. The legal test applied was "the right to control the manner and means" of the agents' work, emphasizing "that exercise of control is not necessary to a finding of employer-employee status if the right to control be shown; and that the exercise of control is itself evidence that the right exists." *Id.* at 39; 1125.

On July 28, 1965, the Board issued its Decision and Order, adopting the findings and conclusions of the Trial Examiner, except that it expressly disavowed reliance on a particular footnote in the Examiner's

Decision. *Id.* at 38, n. 2, 1200, n. 2. On December 21, 1966, for reasons discussed hereinafter, the Court below refused to enforce the Order of the Board.

The significant facts of record, using "facts" to denote the objective and particularized description of what these agents and their supervisors have done, said or written, are not significantly in dispute. There is no material dispute of "fact" in that sense for present purposes, as between what the Board and the Trial Examiner found, on the one hand, and what the Court below found or assumed, on the other—although there are, of course, sharp disagreements as to the legal characterization and pertinence of particular facts, and as to the ultimate conclusion of whether these agents are employees or independent contractors. The pertinent facts may be summarized as follows.

A. These Agents Are Not Independent Businessmen and Do Not Have or Operate Their Own Businesses.

These agents are *not* independent businessmen. They do not have or operate their own businesses. In no way do they represent themselves to the public as being independent contractors or entrepreneurs. They do not have their own places for carrying on their work; the office to which they report and the debit which they cover belong to the Company. They do not have their own organization; they are part and parcel of the Company's organization. They are not free to avoid the regular direct physical presence of their managers and assistant managers; the Company reserves the right to subject them to this presence at its own election. They do not own what they sell nor can they make individualized contracts with any of their customers; these fundamental controls are in the hands of the

Company alone. These agents do not make any investment or take any capital risk; the investment is made and the risk is assumed solely by the Company.

1. Place of Work.

These agents have no independent place of work. Neither the business office which they use nor the debit which they work are their own or subject to their control; they are the Company's exclusively and subject to its sole control.

These agents do not purport to have their own trade or business name, or place of business. They work and represent themselves to the public under the name of the Company, and solely as agents for the Company; and they work out of a particular district office of the Company to which they are assigned by the Company. They are not separately or independently listed in the business section of the telephone directory. A. 818. Those who use business cards show the business address on the cards as the district office of the Company. A. 758. None of the agents involved in the case has any business office for which he pays rent. A. 725, 788. None of them maintains or needs any other business office. A. 125, 230. They may have a work area in their own homes for which they may take a tax deduction, like a desk in a son's bedroom, A. 822, or a space in the family community room, A. 866, or a cubbyhole, A. 230; but not any place of business. As the Board found,

> "With respect to rent, postage, and telephone, these are provided by the Company as well as office space for the agents' use when they come in to attend meetings, settle their accounts weekly, receive mail or request that the office mail something for them, and pick up telephone messages. Provision of such facilities by the Company and use by the

agents must be recognized although agents also use their home telephone and some of them maintain an office or workspace with a desk, etc., in their home." 154 NLRB at 58, A. 1179.

The Company assigns each of these agents to a particular district and district office. A. 40-43, 417, 854. The Company owns the district office buildings. A. 458. The agents pay none of the cost of purchase or of the expenses of maintenance; no rent or fee is charged these agents for their place of work is owned or leased, and maintained, solely by the Company. A. 122.

Likewise, the Company provides and pays all the expenses of the clerical staff and equipment which is available to these agents at their district office. A. 121-123, 298-302, 339-340, 822. In addition, the forms and sales materials which the agents require for their work are made available to them at their district office, entirely at the Company's expense. A. 54-55, 94, 113-119. The Company forms "*are required* when a particular piece of business must be done, for example, the lapsing of a policy or the transferring of a policy." A. 285 (emphasis added). All these forms and materials contain only the name of the Company; the name of the agent does not appear thereon. A. 115, 119; General Counsel Exhibits 23A-23J, A. 113-117.

The Company determined upon the district office in the field, of the size and function set forth on this record, as the fundamental administrative and geographic manner and means of doing this work. The Company selected the manner and means of the district offices in the field as opposed to any other possible organization or structure for this business, for its own interests and purposes. A. 417, 458-459. It deemed this manner and means necessary and desirable, in its

own judgment, to provide "some formulation in order to take care of the details." A. 417. These agents have no alternative to adhering to the manner and means of a district office organization and administration of their work.

Identically, and perhaps even more significantly, the fundamental manner and means of doing this work by debits was established and is controlled unilaterally by the Company. When a new agent commences work for the Company, "He is furnished with a debit book in which policyholders are listed." A. 417. "The book is provided by the company. * * * The policyholders are already in this debit book, have been written by former agents." A. 418. The new agent has the function of collecting the premiums from the policyholders whose names are in the debit book given to him by the Company, free of charge, without any contribution or effort on his part.

The debit book, which is the focus of an agent's activity, is the Company's property, and only the Company's. A. 490. On the question whether the Company reserves the right to take any debit book away from an agent whenever it desires to, Agency Vice President Rose, a witness called by the Company, testified as follows:

> "Q. During his [the agent's] service with the company, could not the company demand to see its own property, the debit book, at any time?
> "A. Yes, I would say that they could.
> "Q. At any time?
> "A. Yes." *Ibid.*

When the individual agent leaves, he must return the debit book to the Company. A. 149. He cannot take it with him, any more than he can take with him any of

the policyholders listed therein. A. 473. On this point the Board stated, "That the agent is dealing with company property is indicated not only by his handling of collections, but by the fact that when his relationship with the Company is terminated, he is required to turn in his debit book." 154 NLRB at 50, A. 1155.

Whether the place of work be deemed the district office or the debit or both, it is subject to the unilateral control of the Company. The assignment of agents to particular districts may be changed by the Company on its own. A. 480-481. As one agent testified as to the Company's conduct when he and other agents who had previously worked for the Quaker City Life Insurance Company ("Quaker City" hereinafter) commenced their relationship with the Company, discussing a notice posted in the office:

> "It stated the debit numbers that the United was now to call the debit that the man was possessing, the man's name beside the debit numbers, and which district he was going to be in, and we were also informed what day to report.
>
> * * * * * * * * *
>
> "* * * This paper showed us that we were—well, I asked the manager at the time, Mr. Formwalt, where was I going to be at, and he said, 'Well, it is on the paper there, which district you are in and which staff you are going to be assigned to.' So I went over to the paper and looked and I was in Mr. Kropf's district. At the time, the staff was unassigned. There was no assistant manager on this particular staff. So this moved me from the second floor up to the third floor, and it moved my reporting day from a Friday to a Thursday." A. 355-356.

As the Board found, "Each assistant manager checks the weekly account sheets and other forms required of

his debit agents by the Company, offers advice, periodically offers assistance in making calls, actually does assist the five agents under him, and prepares a weekly report with the agents' assistance." 154 NLRB at 53, A. 1164.

2. Organizational Hierarchy.

Far from being on their own and apart and independent from the Company's organization, these agents constitute an integral and inseparable element in the Company's organization and administrative structure. They are each and all assigned to a particular district office, which is headed by a particular manager; and also to a particular staff within that district, which is headed by a particular assistant manager; and, as we have seen, to a particular one of the Company's debits. A. 40-42, 127, 201, 355-356, 417.

The number of agents assigned by the Company to each district and to each staff appears small enough to insure a close relationship—intimate knowledge by management of what each agent is doing and how he is doing it. There are about twenty agents in each district. A. 40. "Each assistant manager has control of or oversees a staff of five agents." A. 42. The Company decided that five or six are the "proper number" for assistant managers to work with. A. 471-472.

The Board found, "That assistant managers assist and have under review only five agents indicates the closeness, immediacy, and personal nature of such review; and close review itself suggests and indeed would be meaningless without supervision and control since it does not appear that the Company engages in such close and continuous review merely out of curiosity." 154 NLRB at 53, A. 1165.

Administratively above the agents and their staff managers, the Company operates an entire "agency organization," from Agency Vice President Rose down through "regional managers, state managers, division managers, district managers." A. 396.

Moreover, the relationship between these agents and the Company is not *ad hoc* or transitory. The Company admittedly and deliberately makes length of service a factor in the computation of certain commissions, and pensions and other rights as well; and in general, encourages prolonged service by agents, in its own interest. A. 418-419.

3. Physical Presence of the Company.

The Company reserves the right at its election to subject the agent to the direct physical presence of the agent's manager and assistant manager, as well as special writers and other management officials. This right is most actively exercised under current practice, in two principal ways: (a) assigning assistant managers and special writers physically to accompany the agent as the agent does his work outside his district office; and (b) requiring physical reporting to their district offices by all agents at least one day each week and by individual agents as the Company may direct.

a. *Accompaniment On Debit In Company's Discretion.*

The Company exercises direct physical control over the agents outside the office and while they are working on their debits, by having their assistant managers or other management staff physically accompany them. This is the basic function of the assistant managers

and special writers, as demonstrated by the reports in the General Counsel Exhibit 40 series. A. 344-346. The designation on the form, "Assignment this week," and the insertion under that column heading of the name of the agent whom the particular management representative has been accompanying that week, demonstrate that the regular assignment of these management personnel is to accompany the individual agent on his debit.

The agent's assistant manager announces these assignments—tells the agents on his staff which of them will be accompanied during the following week by himself and which by special writers or other management representatives—at the regular weekly staff meeting. A. 131-132. There is no particular discussion or formality; the assistant manager merely tells the agent of his selection, "I will be with you this week." A. 134-135. As to this the Board found, "the assistant manager is required by the Company to assist the agent even to the extent of making calls on policyholders. This, I find, is not dependent on the agent's request." 154 NLRB at 53, A. 1164.

The testimony of Divisional Manager Formwalt, a witness called by the Company, is instructive on this score:

> "I think the assistant manager will say 'John, may I go out with you this week? You had a little low production the last couple of weeks. How about me going with you?' and John will say, 'Well, okay.' He can refuse it and sometimes he has, because he has something to do, and he will pick up someone else, or the agent might say, 'Well, I think I have a good week going. How about going with me, Bill?'" A. 517.

This testimony reaffirms that the assistant manager has exercised—and thus *a fortiori* reserves—the right of assignment in terms of the assistant manager's own appraisal of the adequacy of the agent's performance. It reaffirms that the agent requires some explanation to dispute or refuse any assignment made by the assistant managers. He must cite some excuse or reason—"because he has something to do." Manifestly, in the ordinary course of business, the agent simply accepts the assignment, and the assistant manager accompanies the agent of his own selection on the debit. Should the agent have a sufficient excuse, what then happens, according to Formwalt, is that the assistant manager "will pick up someone else * * *." While Agency Vice President Rose at first seemed to attempt to give the impression that Company management did not physically accompany the agent on his debit unless the agent requested it, Rose conceded that he himself knew of no agent in this unit who had ever made any such request. A. 479. And Rose expressly and voluntarily amended his testimony to show that, in at least some of the districts involved in this case, the assistant manager does regularly initiate the arrangement to accompany the agent on his debit. A. 485. Moreover, the manager himself may accompany the agent and has authority to determine when an agent shall be accompanied. "With the experience that Mr. Kropf has in the insurance business, and he would not have been made a manager unless he had the experience," Formwalt testified, "I do not question his judgment on when he is going with a man or why he is going with a man. We entirely leave that up to the district manager." A. 594.

Additionally, there is or may be direct physical supervision on a debit analysis review and on an audit. Both are procedures of the Company which it can invoke at such times and circumstances as it determines alone. Debit analyses may be ordered by the agent's assistant manager. A. 606. They may evidently be ordered by the manager; in one district five debits were analyzed in one week. General Counsel Exhibit 40B, A. 346-347. And whenever Divisional Manager Formwalt wants a debit analyzed, he merely directs it to be analyzed, as he sees fit. A. 613. He likewise has authority to order audits at any time. A. 615. While the Company has no firm rules as to the frequency with which it will subject each agent to audits or field inspections, there would probably be at least one each year. A. 569. In these fashions the Company exercises its right to impose its direct physical presence upon these agents.

b. *Compulsory Weekly Reporting To The Office.*

There is ample evidence supporting the conclusion that these agents are required physically to report to their district office at least once each week and to attend meetings which the Company then and there conducts. The Board found, "The requirement to report and to attend weekly meetings is recognized even if it can be stretched or waived." 154 NLRB at 47, A. 1146.

The principal witness called by the General Counsel testified as follows:

> "We attend every Thursday morning, unless it would be a holiday or something and the company would then excuse us after we had turned in our money, or in certain instances where collections are heavy, like in Baltimore it is the 11th of the month, welfare checks, they will excuse us early.

> Other than that, there is always a sales meeting by the district manager and by the assistant manager. All agents in the district attend unless they are excused." A. 41.

Even when the agent was on the witness stand at this very hearing he had to obtain permission to leave before the meeting was completed. "I advised Mr. Dempsey [my Manager] that the hearing was to be convened again that day and that my presence was required, and he said, 'Fine, you can go whenever you have completed your business.'" A. 270.

"I would say in the affirmative that there is a rule that says we must report on Thursday." A. 317. "We are required to report at 8:30." A. 61.

All agents in a district office report at the same time. A. 41. The manager of the district determines and announces the reporting time and day or days which the agents in his district will observe. A. 127, 202-207, 356, 537-538. Managers have changed the reporting day, in general, A. 356, or for particular weeks, A. 332-334. The Company assumes that all agents will be present at the meetings, for this is how the Company gives the agents the information it would like them to have, for example about contests. A. 602.

On the requirement of physical reporting, the Trial Examiner's conclusion adopted by the Board was as follows: "Having considered the various denials, explanations, and contradictions, I find that the debit agents are required to appear at their district office one morning each week; that there are usually sales meetings with the manager and then the assistant manager (sometimes also with higher company officials), followed by individual meetings and discussions be-

tween the agents in turn and their assistant manager; and that the agents on that morning turn in their weekly reports and collections." 154 NLRB at 46, A. 1144.

Agency Vice President Rose could not name any agent in this particular bargaining unit who did not physically come to the office and physically hand in his weekly accounting reports at his district office. A. 450. Agent Von Saleski, also a witness called by the Company, confirmed that all agents in his district reported on the same day, A. 718; and that managerial consent was required before an agent could come into the office with his weekly report on some other morning. As an example of an occasion when he had been permitted to report on a day other than the regular reporting day, which for him was set by the Company for Thursday, Von Saleski stated, "I had business lined up, new business prospects, on a Thursday, and phoned the office if it would be all right if I would come in Wednesday and leave it there until Thursday or if they would accept it on Friday instead, and there was consent on their part." A. 720. He confirmed the requirement that the report must be submitted personally; it cannot be mailed in, the agent must physically present it to management. A. 742.

The principal purpose of the reporting is for the agents to submit reports which management can check to determine how the agents are performing their work. For one thing, the agents report the amount of money which they have collected on behalf of the Company. As the Board found, "The point is not merely that the money belongs to the Company, but that the debit agent is functioning as its direct and immediate agent and on its behalf rather than on his own. The Com-

pany is not itself obtaining these moneys by supervisors or any who it admits are employees, but is utilizing, as completely as it could any employees, the services of its debit agents." 154 NLRB at 46, A. 1144.

The weekly accounts are submitted to the assistant manager for his inspection and approval. A. 55, 1060 ("Inspected by ....."), 1062 ("Inspected By ....."), 1064 ("Approved By ....."). If the reports are "incorrect," the assistant manager "checks them and tells the agent that they are incorrect and they should be corrected." A. 483. The assistant manager makes clear how they must be corrected, and the agent complies.

The accounts may not be settled by personal check, except with management approval. A. 450. The agent "would have to go to his manager and request to turn in a personal check. The manager does have the power to initial or 'O.K.' the personal check. Then it can be turned in." A. 68.

Further, the agent turns in to his assistant manager the applications for new insurance which he has written during the week. A. 59, 85. The applications must be checked carefully by the district manager also. A. 1110. If errors are made in the applications, the Company management will return the application to the agent involved and will talk to the agent about the errors. A. 599-600. As to this, the Board found, "Aside from the required use of company forms by agents in submitting information, the Company's right to check each policyholder's account and the breakdown as well as the sum total of the agent's collections, together with the detailed oversight by the

assistant manager, reflects a degree of supervision which negates independent contractor status." 154 NLRB at 47, A. 1148.

The Company may take the occasion of his reporting—as any other occasion—for discussing his work with the agent. On an occasion when Agent Roberts reported, for example, he had a talk with Divisional Manager Formwalt that ultimately led to a successful demand for Roberts' resignation. "One thing led to another," Formwalt related, "when the man came into the office. I mentioned to Mr. Roberts you are in the hole. You are off draw." A. 600.

In addition to the regular reporting days, individual agents may be required to come into the office to talk to management, as management desires. Agent Gore, for example, was thus asked to report to the office on a day which was not his regular reporting day. A. 632.

Management asserts the right to impose its physical presence on these agents by calling them in for conferences when and as it wills. One manager's report, for example, not specifying whether it was done on a regular report day or on an occasion when the agents specified were directed to report specially, was as follows:

> "Have talked with Mr. Daugherty and Mr. Hicks about their let down in the current quarter. Both seem to realize they have accomplished very little and promise to try and do better in the coming quarter. Mr. Gundina was assisted by Mr. King, assistant manager, and was also talked to by the both of us." General Counsel Exhibit 40A, A. 344-346.

In sum, as the Board found, "The regularity of the exhortation and advice at meetings and as directed in

company memorandums, and the frequency of special contests and awards belie whatever minimum of independence and arm's length dealing might be deemed necessary to characterize independent contractor status * * *." 154 NLRB at 46, A. 1145.

4. Limited Authority of These Agents.

Further, the insurance policies which these agents sell are the Company's and the Company's alone. This is no distributorship relationship such as an automobile dealership, where a product is sold and title passes from the manufacturer to the dealer, and the utlimate consumer purchases it from the dealer, and where the dealer assumes some or all of the risk of financial loss if the products are not sold; in this case, quite to the contrary, at no point does the agent have title to the policy nor can he assert any control. The only relationship which the consumer has is with the Company. The consumer knows that the policy he has purchased is the Company's and binds only the Company. The consumer knows the agent only as the agent of the Company.

Certainly these agents may not bargain or "deal" in order to make a sale, like a truly independent automobile agency or independent contractorship can and does. *"Agents Are Not Authorized To Make Contracts*—alter, or discharge contracts, waive forfeitures, quote rates other than those published by the Company, allow rebates or bind the Company in any way beyond the written or printed procedures received from its officers." A. 1095 (emphasis in original); and A. 1069.

"Clearly" as the Board declared, "the business is the Company's directly; it does not belong to the debit

agent. The agent is not an independent contractor handling a debit over which he has sole control and from which he can exclude close supervision; he is an employee of the Company." 154 NLRB at 51, A. 1157; "Further, the business done by the agents belongs to the Company." *Id.* at 50, 1156.

5. Capital Investment and Risk.

No investment, no assumption of capital risk, is needed to become or to remain an agent for the Company. See, e.g., A. 157, 728. Indeed, there is no requirement that these agents make any expenditure of funds for any purpose. None was even claimed at the hearing, with the single exception of the initial license fees to the State of Maryland, as to which the estimates of the amounts involved ran from $2.50 to $10.00. A. 694, 728, 755, 811. Even this had not been required of the former Quaker City agents at the time they commenced their relationship with the Company. A. 26. The Company assumes the costs of license renewals. A. 811.

These agents have no overhead expenses and need have none. They need have no payroll; they need have no employees. In this particular unit, none of the agents has any employees or regular assistants. A. 148, 723, 788. In fact, Agency Vice President Rose told a meeting of many of the agents that it would be against the Company rules to have an outsider—one not licensed upon application of the Company to work for it—to do any collecting or any agent's work. A. 220-223. In this particular unit, no one has been so licensed by the Company. A. 457.

Further, there is no requirement that any bond be paid for or provided by the agent. A. 71. Agent

Scott's testimony that "I have never paid any sort of bond whatsoever, on this form or any other", *ibid.*, is the only evidence of this record relating to bond expense.

As to postage expenses, the only regular and recurring expense appearing on this record is that involved in the return of receipted premium receipt books to policyholders who have mailed their payments to the Company. And this expense is concededly paid by the Company although the agents receive collection commissions as though they had personally collected them while working on their debits. A. 97-98, 540-541, 724-725. While there was a suggestion that some agents may mail out some arrearage notices at their own expense, A. 431-432, there is no suggestion that this is regular or significant, and *a fortiori* no suggestion that this is an expense required of the agents in order for them to maintain their positions with the Company.

As the Company has made all the capital investment required for this work, these agents assume no personal capital risk. Their only risk is that they will lose their job. They cannot lose any of their capital as they have invested none. As they do not purchase anything for resale, have no investment and no overhead expenses, the entire concept of profit is alien to this relationship, precisely as alien as it would be to any employer-employee relationship. Under all these circumstances, these agents are not "on their own." They are "on" the Company.

B. These Agents Do Not Have Any Means of Livelihood Other Than Their Jobs as Agents With the Company; They Have No Real Bargaining Power Vis-a-Vis the Company.

1. No Experience or Previous Training Required.

These agents, who do not operate their own businesses, cannot be considered on their own or independent, for the additional reason that they do not bring to this relationship any such independent training or skill as would enable them to make their livelihood independent of the Company. They are far removed from the typical picture of the lawyer or physician as independent contractor: one whose professional training and experience produces sufficient demand for his services so that one particular relationship is not vital to him. To the contrary, the hard fact is that these agents may be and are hired by the Company without any previous experience whatsoever in the insurance business. They are recruited by newspaper advertisements or the suggestions or references of other Company agents. A. 403.

2. The Company Trains the Agents in the Manner and Means of Doing Their Work.

The Company must train the agents in the manner and means whereby they shall do this work. This fact was aptly expressed as follows by Agent Von Saleski, who, after making clear he had had no previous experience or training in the insurance business, was relating how he came to be hired by the Company:

> "I did inquire what kind of job it is, and he [the district manager] told me it is collecting and selling, mainly, and *he would furnish the tools and he would give me an instructor,* and we would go right in the middle of things and I would get a debit. An assistant manager would introduce me to the people so that I would get to know them

and they would get to know me. And *he would show me how to sell or how to solicit* the people." A. 727 (emphasis added).

"In fact," the Board found, "the assistant manager is an important part of the assistance which Von Saleski testified he was promised when he was 'hired.' The furnishing of tools, such as the debit book and forms, office space for periodic meetings and services, an instructor while the agent is acquainting himself with the area, accounts, and work, with full earnings accruing to the agent since the assistant manager who instructs is otherwise compensated, is an element of employer-employee relationship. The agent, typically an employee, at this point invests only his time. The Company alone makes the investment in office space, materials, and instruction facilities as it trains him and supervises his work." 154 NLRB at 54, A. 1166.

The Company reserves and exercises the right to train any and all of these agents. The assistant manager admittedly has the duty of training new agents. A. 459. Further, the assistant manager or special writer obviously performs or can perform a training function as he wills when accompanying the older agents on their debits. Additionally, the weekly sales meetings perform a training function; they provide perhaps the most readily available vehicle for the Company to impose its views as the manner and means—the "how to"—of this work.

How to sell—the manner and means of selling—is the principal subject matter of these meetings. "You say to them 'Here is something in this policy which ought to be real salable. Point this out to the prospects and you will probably be able to sell this insurance.' " A. 530. The manager "may explain or has explained

on occasion some of the details of the particular policy, giving examples of how to approach a policyholder, what to say, how to overcome objections that the prospect may have * * * ." A. 129. A lot of the agents "maybe are not completely familiar with the complete approach, or the complete terms of the policy and, therefore, it is reviewed. In other words, we go over everything." A. 800. After the district-wide meeting, there are meetings by staffs. A. 131. "Many times the things that the manager had spoken about are reviewed by the assistant manager. He, again, reviews the staff record with the individual agents on that staff, and individual records of the agents on that staff, in detail." *Ibid.*

3. No Other Means of Livelihood.

It is clear that these agents rely upon their relationship with the Company for their livelihood. On this record, there is not to be found even any significant claim of outside employment. No agent testified who had in the past few months sold any insurance for any other company. While Agent Scott had done this before recent months, he had discontinued selling for other companies and would no longer do so. A. 91. Agent Spalding declared he had sold no casualty insurance since January, 1964. A. 868. The other agents indicated they had never been licensed by other insurance companies. A. 359, 744. Those who had been licensed by other insurance companies were apparently noted by the Company on some list, evidently not prepared in the regular course of business for purposes other than the hearing, which it said it would produce if it could find it; no such list was produced. A. 425, 454. In any event, the Company admitted, "We do not look with favor where we have the same prod-

uct to sell, that an agent would go out and place his business with another company." A. 411. On this entire record, including the various references and suggestions relating to the amounts of money which could be and were being earned by the agents, the fact is clear that these agents rely upon the Company for their living.

C. The Rates and Manner of Compensation Payment Are Determined and Controlled by the Company.

1. Rates of Compensation.

The rate of compensation received by these agents is dictated unilaterally by the Company. The basic provisions, the Agent's Commission Plan, A. 1051-1059, were determined and drafted at the home office of the Company and distributed to the various district offices, all without the participation of any agents. A. 490-494. The agents do not participate in the drafting of any of the terms of the Plan. A. 27. It is presented to the new agent for his signature; he has solely the option of signing or going to work somewhere else. A. 183, 185, 494. It is presented to him for signature not negotiation; as one agent testified, "The contract was a commission plan which I signed, and I did not help to create this commission plan." A. 711. There is no contracting as between independents or equals. As Agency Vice President Rose testified, "The change [to this Plan] was handled through the Board of Directors and the agency men [agency vice presidents, regional agency vice presidents] of the home office." A. 491. The decision having been made by the Company at its home office, "These commission plan booklets were forwarded out to the district managers * * * and the divisional and state and regional managers." A. 492.

Moreover, the Company amends the Plan in practice without formal amendments as it sees fit. Contribution towards travel or car expenses is not covered in the Plan, for example, but one of the agents testified, "The company allows me to take one percent of my total collections as car allowance." A. 358. The Company makes this allowance where, in its unilateral judgment, "an agent has a large territory that he covers and there might be those circumstances that would make an adjustment of his commissions feasible." A. 409, 617. Patently, the Company controls the amount of the contribution towards travel expenses, as well as the agents or debits to receive it. These changes are at all times subject to its control regardless of the Plan.

Further, the Company has unilaterally amended the Commission Plan by inaugurating in 1962 a "service award bonus." A. 475. This is in reality a vacation plan. The agent is permitted one week off after one year of service and two weeks after two years and is "paid for this period of time off, one week or two weeks, he is paid a percentage of the average of his commissions for the previous four weeks prior to this time off." A. 475. The assistant manager covers the debit while the agent is off, and the agent receives, in addition to the service award bonus, commissions on the sales made by the assistant manager. A. 476, 486. Whenever an agent is absent, whatever the reason, his assistant manager will endeavor to cover his debit and perform the required servicing. A. 418. In sum, as the Board found, "It does not appear that the assistant manager busies himself with matters other than those which relate to his agents. He announces at weekly meetings which agent he will accompany the following week, and he covers the agents' debits when they are

on vacation, the agent receiving his regular commission on the premiums collected and new business written by the assistant manager. * * * Through all of this the assistant manager who replaces the agent remains an employee of the Company; he is not an independent contractor." 154 NLRB at 53, A. 1164-1165.

2. Manner of Payment.

The Company reserves and exercises the right to control the mechanies of the payment of compensation to these agents. Specifically, the Company controls the extent to which they may retain their commissions from the collections which they make on behalf of the Company. The Company permits such retention in the case of industrial insurance but proscribes it in the case of ordinary insurance. In the latter case, the entire premium must be paid to the Company by the agent. A. 812. The agent may not withhold his commissions; the Company pays whatever commissions are involved, at a later date. A. 812-815. Should the Company at any time decide that this system shall be extended to all types of insurance and thus to terminate net remittances on every type of insurance, the Company patently has reserved full right to effectuate its will in this respect.

Moreover, when it permits retention of commissions, the Company closely reviews and controls the amounts which are retained. The Agent's Commission Plan which the agents must execute itself expressly provides, "The Company reserves the right to conform commission payments to the agent in accordance with the true condition of his account and records." A. 1058; see also *id.* at 1053. In any event, the Company clearly reserves such right, for it actively exercises

it in practice by means of a weekly review of the agents' deposits and accounts. The forms provide for inspection or approval by the superintendent or assistant manager. A. 1060, 1062, 1064. In regular routine, these forms are presented by the agents in person to their assistant managers, who check them, prior to the agents' turning in their deposits. This provides immediate and direct review of the amounts which are retained by the agent. As Agent Scott testified:

> "When this [the weekly accounting form, A. 1060-1061] is complete, I sign it, submit it to my assistant manager, who is always located in the same location in the district where I report, and he checks it over, *checks it to see that I have not drawn too much money in my commissions.* * * * In other words, he inspects it and okays it by signing his name on there. Once it has been okayed, I am then permitted to go down to the company cashier and submit it along with the monies that I have collected that week." A. 55 (emphasis added).

What is significant about the manner in which the agents are paid is this direct and immediate review in every case of the amount retained by the agent as his compensation. That amount is subject to the control of the Company; if errors are detected, they are immediately corrected, and, as we have seen, corrected as the Company determines.

The type and form of money deposit and accounting is dictated by the Company. At the time of this particular hearing and the making of this particular record—and the Company obviously reserves the right to modify or supersede this at any time:

> "Every 13 weeks is an audit of the debit, and we don't turn in necessarily the amount of cash that

> we collected that particular week, but the amount of money that the audit calls for, which may be a few dollars less or a few dollars more, depending on any errors or anything that we may have encountered in the past 13 weeks. * * * This particular week that this is done the company insists that we do not settle by cash, that is, the exact amount of money that we may have collected in that particular week, but they insist that we settle in accordance with the true accounting." A. 57, 56.

The timing of the deposits is not left to the discretion of the agent, except that he may make them more frequently than the Company requires; he cannot make them less frequently than the Company requires. He must make them "promptly." A. 1058-1059. He must make them weekly or biweekly, as required by the reporting enforced in his district by the Company.

In general, as found by the Board, "While the Company does not fix an agent's hours for debit collections and other services on his debit, this work must generally be fully attended to each week; the agent must periodically reach his policyholders * * *, see that the payments which they owe to the Company are maintained, and turn in to the Company each week the money which he has thus collected or otherwise received, less any sums due him by the Company or to be credited to him." 154 NLRB at 46, A. 1143.

D. The Company Reserves and Exercises the Right to Fire These Agents.

"If any agent believes he has the power to make his own rules and plans of handling the company's business then that agent should hand in his resignation at once. * * * If we learn that said agent is not going to operate in accordance with the company's

plan, then the company will be forced to take the agent's final." A. 609-610, 1120. These words, which were read in many of the districts to which these agents are assigned, A. 610, expressly and ineradicably demonstrate the Company's reservation of the right to control the manner and means of the agents' job, and to fire—"final"—any agent who attempts to stand on his own in relation to the Company's control. These words were contained in a letter signed by the Chairman of the Board of the Company. A. 690-692, 1120. Their meaning and force is not one whit attenuated by their general context of a dispute between the Company and the Union, nor by their grammatical context in the letter, A. 1120, in a single sentence commencing with a reference to lapses. The reference could have been to any other thing, any aspect of the means and manner of the work of these agents; the choice of directing it to lapses this time was obviously the Company's and the Company's alone.

It is unmistakably clear, in both the general and the grammatical contexts, that the thought expressed is definitely not limited to lapses or any particular phase of the business. The thought expressed is comprehensive and absolute. In general, the evident purpose is to show the Union agents who is boss, not to declaim on lapses. A parsing of the sentence shows that the words quoted are independent of the introductory phrase. In any event, even if this particular instance is considered limited to lapses this communique of the Company provides eloquent and irrefutable proof of the *reservation* by the Company of the right to fire an agent for causes of the Company's unilateral selection. It may be lapses today, but it can and will be any issue tomorrow which the Company will select

as another occasion for again notifying the agents that *it* is in control, and that *it reserves the right to fire any agent who does not conform strictly to its control.*

The quoted words also illustrate the semantic preference of the Company in describing its terminating an agent, a preference for "resignation" rather than "firing" or "discharge." The end result is of course identical: the agent no longer has his job. While the first sentence quoted ends the "agent should hand in his resignation at once," the second drives the intended and expressed meaning home so that it cannot possibly be misunderstood, "the company will be forced to take the agent's final." If an agent is requested to hand in his resignation, the implicit or explicit premise necessarily is that he will be fired if he does not. Whenever the Company asks for a resignation, it obviously, and to the agent's knowledge, is reserving—and will exercise—the right to take the agent's final, to fire him, if there is no resignation. The words may be different, but the tune remains the same: it is a dirge for the continuation of the agent's relationship with the Company. As the Board stated, "Whether the terminology be of discharge, encouragement to leave, or resignation, control and employees status are clear: the agent is effectively 'dead' in any event." 154 NLRB at 45, A. 1142.

Agents are asked for their resignation whenever the Company, in its own lights, finds their performance inadequate. It is the manager's job "to see that the district makes production," A. 594; and if some agent does not contribute as the Company believes he should, to get rid of him. In one case, for example, Divisional Manager Formwalt testified he "made it clear" that

if the particular agent "did not improve his record so far as production goes, increase in condition of account, that I think it would be better for the man to maybe try some other type of business because he just was *not doing as well as we expected.*" A. 599 (emphasis added). In another case, the manager asked Formwalt for permission to bring about a parting of the ways between the agent and the Company because "the man was doing so poorly, and we had tried to help the man, assist the man, *the assistant manager going with him, and Mr. Kropf* [*the district manager*], *himself, had been out with Mr. Gore* [*the agent*], and Mr. Gore had not really shown any improvement. This is after a couple of months had passed. In fact, Mr. Gore's record was getting poorer—." A. 591 (emphasis added). This pattern was repeated in other cases. A. 567-568, 595.

By its right of termination the Company controls the details, the manner and means, of the agents' performance of their jobs, exactly as does any other employer which acknowledges it is an employer. The Company admittedly controls, for example, how frequently the agent visits his policyholders. Agency Vice President Rose made it clear that the Company would fire an agent who did not visit his policyholders "over a long period of time, an unreasonable period of time." A. 442. He made clear, however, there was no requirement that the agent visit his policyholders every week; and he was asked where the line would be drawn. The reply was as follows:

> "This would have to depend upon circumstances and the condition of this man's policyholders. I might say that there are some agents who collect their premiums in advance. They could possibly

> be off two weeks and it wouldn't affect them a great deal. Other agents who are not as good operators or who do not take care of their business as well as they should—maybe the second week would affect their policyholders to a great extent and we would consider that as a reason for termination. This is an undeterminable situation, depending upon each individual involved." A. 442-443.

Manifestly, the Company reserves the right to determine what is a reasonable period of time for visiting the policyholders on a particular debit, and to fire agents who do not visit policyholders as frequently as the Company believes they should. If an agent did not visit his policyholders frequently enough, in the Company's view, if he did not service the policyholders in a manner satisfactory to the Company, that would be a matter of concern to all levels of the Company's management, from the assistant manager, up through the district manager, division manager, state manager, or regional manager, and in a sufficiently serious case, to the Agency Vice President himself. A. 442-443.

These agents recognize that the means and standards are defined and enforced by the Company. Even the agents called as witnesses by the Company found themselves admitting this. Agent Von Saleski, for example, conceded, "I must make the calls, yes", as provided in the debit book. A. 700. He testified also that the Company considers an agent's sales production poor if it falls below $26 increase in the year to date; and that the Company would assist the agent if he fell below that standard. A. 743-744. The assistance, as always, would necessarily be in the manner and the means of the performance; the assistance would

be in selling and how to sell so that the results could be improved. As to the means and manner by which the collection function had to be fulfilled, Von Saleski stated as follows, "They don't require it, but they expect it. * * * They expect a minimum amount, I believe, of about 90 percent * * *." A. 750.

In the real world, there is no difference whatever between an employer's *requiring* a certain manner or standard of performance and his *expecting* it. Disappointing an employer's expectations will propel an employee down the road to discharge just as swiftly and surely as falling short of the employer's requirements. Expectations and requirements are both standards—prescriptions of the manner and means of doing the agents' work—which these agents must fulfill to keep their jobs with the Company.

"It is required" Agent Rock conceded, "to collect the debit." A. 771. These agents are supposed to, and do, collect from each policyholder when the premium is due. A. 829.

Further, as Agent Scott testified, "we are expected to try to write new business every week." A. 286. The Company "expects the agent to maintain his debit, the debit assigned to him, in an orderly, businesslike manner * * *." A. 236. It virtually goes without saying that it is the Company which defines, and certainly reserves the right to define and redefine, what is "an orderly, businesslike manner."

The very function of management is to keep check on the manner in which the agents do their work. That is the purpose of requiring the agents to make weekly reports and to turn those reports in to their assistant managers for review and approval.

What the assistant managers do, according to Agency Vice President Rose, is:

> "* * * check the reports when they come in on the day that the agent reports. * * * The agent keeps track on his account form of his yearly collections, of his weekly collections, his yearly collections, the amount of new business that he has issued, the lapses that come down. All this is prepared by the agent. Certainly as assistant manager, when looking this over—well, there is an arrears percent, determining how much of this business is in arrears, or the percentage in arrears. All of these things are factors which would indicate whether this agent is taking care of his business as he should be." A. 444.

E. Other Pertinent Facts.

1. Company Control Over Transfers and Lapses of Insurance Policies.

These agents are not free to transfer policies in their discretion; the Company has prescribed how such transfers shall be made, and it plainly reserves, for it has exercised, the right to approve or disapprove particular cases.

A proposed transfer "must be approved by the assistant manager or, as the form shows, the superintendent, of the agent who is to receive the transfer." A. 74. The Company's Transfer Policy Schedule form shows a blank for the signature of the management representative, approving the transfer. A. 1065. The plain fact is that without the Company's approval, no agent is permitted to transfer, exchange, sell or assign his debit. A. 148. On the receiving as well as the transmitting end, the agent has no discretion. He must accept the business if the assistant manager tells

him that the business has been transferred to him; the agent is not free to decide for himself whether or not to accept the transfer. A. 138-139.

The case involving Agent Jenkins illustrates and demonstrates the reservation of control by the Company. He had arranged with another agent for business to be transferred to him; but his assistant manager did not approve—and the business was not transferred. A. 359-362. Agent Jenkins asked his assistant manager what happened, and the assistant manager replied, "Well, I gave it to Mr. Tregesser [another agent]. * * * The reason I gave it to Mr. Tregesser is he has a small debit and I am trying to build it up." A. 361, 362. Agent Jenkins testified he made objection to his assistant manager about this transfer: "I informed him that I had an agreement with the man who accepted the transfer, and I thought that this would prevail. * * * [But] he said he gave it to Mr. Tregesser because he wanted to build his debit up." A. 376.

This one case is sufficient to refute any Company claim that it does not retain any control over transfers. Divisional Manager Formwalt, for example, testified that the agents may transfer business at will, A. 510; but when this Jenkins case was brought to his attention, he said he would be talking to the assistant manager so that transfers would be permitted in the future. A. 512, 513. Such testimony emphasizes only that the Company can give instructions one way as well as the opposite way. The extent to which agents may transfer or accept business is under the control of the Company. As the Board found, "Even if instances can be cited of transfer of a policyholder

from one agent to another without approval by the company supervisor * * *, many approvals and some disapprovals, in other instances indicate the Company's right to exercise authority. Despite the efforts to show independence in connection with transfers, the Company's control and the agents' lack of authority are clear: Company approval must be obtained, and the transfer forms so indicate." 154 NLRB at 52, A. 1160.

The same is true of the lapsing of business. The agent's manager must sign the lapse form, A. 82, the Lapsed Policy Schedule, on the line for the signature of the "Superintendent." A. 1066, 1067. The agent turns the form in to his own assistant manager. A. 83. Detailed rules as to lapses are promulgated by the Company. Some of these relate to the time within which lapsed cases must be reported or may be collected. According to Agent Scott,

> "If I make a collection on a particular policy, the policy in question, before the expiration of the grace period, which would be the following Monday, I am permitted to either call the office or come in—call the office and ask the girls in the office to remove said policy from the lapse sheet, or I may come in and do it myself. * * * However, if other lapses develop between Thursday morning when I report and Tuesday afternoon at 2 o'clock, which is the deadline for submitting of ruling of lapse, I may submit an additional piece of business for lapse." A. 82-83.

Other rules established by the Company relate to when the page relating to the lapsed policy may be removed from the agent's debit book. "The rule that we have been told from management is that when a case has

lapsed in our book, this particular page that has been lapsed is to stay in our book for thirteen weeks for this after it has been lapsed." A. 362. The agent has no reason of his own to do this; he does it solely because the Company has told him to do it. A. 377-378.

2. The Continuation of the Quaker City Relationship.

The issue at bar concerns exclusively the relationship between these agents and the Company. Any other relationship is not directly relevant, whether it be the relationship between the Company and some other type of agent or organization,[2] or the relationship between some of these agents—those reporting to the Franklin Street Office when the Company took over—and their former employer, Quaker City. The latter relationship, which admittedly was one of employer-employee, may assume some relevance, however, to the extent that it has been continued by the Company.

The record shows that there has been such continuation in significant respects. With respect to the vital relationship between agents and their assistant managers, for example, Divisional Manager Formwalt testified that all personnel are carrying on as they did in Quaker City. A. 563. He has given no instructions since the Company took over with respect, for example, to assistant managers' accompanying agents on the debit, because the relationship under Quaker

[2] On this basis the Trial Examiner rejected evidence the Company proffered with respect to a general agency organization it was utilizing in Maryland. 154 NLRB at 40-42, A. 1127-1132. He likewise held that the status of the Quaker City agents vis-a-vis Quaker City was irrelevant. *Id.* at 43, 1134.

City had been satisfactory and acceptable. A. 565. Further, he testified that the reporting system had not basically changed since the days of Quaker City. A. 537-538. Accordingly, it could well be found that the employer-employee relationship which formerly existed is now characteristic of the relationship between these agents and the Company. The changes in fact made by the Company have not been so significant as to require or support any finding that they have become transformed into independent contractors.

Moreover, to the extent that changes have been made, they have been made at the Company's unilateral direction and control. Indeed, the very manner and means which the Company claims it utilized in transforming these agents into independent contractors demonstrates the closeness and severity of control exercised by the Company. To put agents truly on their own, nothing more is needed than to leave them on their own. In particular, for example, it would have been significant, when the changeover from Quaker City was effectuated, if the Company had withdrawn the administrative hierarchy, the requirement of physical reporting, the scrutiny of the reports, the right to fire, and the regular meetings, which were the principal characteristics of the relationship with Quaker City which rendered that relationship one of employer-employee.

In fact, the Company embarked in the opposite direction. The demonstration of this is the direct testimony of Agency Vice President Rose, when he was asserting the legal conclusion that the agents were considered independent contractors and that the Company

did not control their work. The testimony then proceeded as follows:

> "Q. How do you go about effectuating this policy in the area involved?
>
> "A. Starting from myself, through the various positions that I have quoted previously, *we conduct meetings.* We have managers meetings, assistant managers, have the agents, if they do desire, attend these meetings to project this idea of an independent contractor and the lack of control that they operate under.
>
> "Q. What over-all instructions do you give, if any, to your management people with respect to carrying out this objective or policy?
>
> "A. We are constantly giving them instructions verbally." A. 403 (emphasis added).

The Company doth protest too much. Constant instructions in meetings are antithetical to lack of control and independence. Instructions in meetings are obviously means for asserting and exercising control. Actions speak louder than words.

Divisional Manager Formwalt testified that his superior told him, with respect to the former Quaker City agents, "they would be on their own, they are in business for themselves, and that I would have to try to relay this to the men." A. 498. This cannot be relayed with words; it has to be communicated and effectuated, if at all, in conduct and action. Whatever the Company preaching about being on their own, these agents could not misunderstand that the Company practice is one of control, when there is an administrative hierarchy above them, assistant managers, district managers and the rest of the retinue, imposing and enforcing requirements upon them to report regularly, to be physically accompanied by their su-

pervisors as they go about their work at any time, to be subject to checks and reviews of their work, subject always to the right to fire and all the other rights reserved by the Company which have been noted above.

It merits emphasis that the record demonstrates that the controls exercised and asserted by the Company are identical and uniform throughout the entire unit. There is no basis whatever on this record for distinguishing the agents who reported at Franklin Street from those who reported at St. Paul Street. There are perhaps some assertions of variation between these two groups. In large if not complete part, these assertions cannot be credited as factual, but must be rejected as reflecting only the special motivation and semantics of those whose overweening purpose and motivation is to defeat Union organization by having this case result in a finding of independent contractor. In any event, to the extent that assertions of variation are to be credited, the variations manifestly reflect the choice and control of the Company. What is enforced and prevailing at any one Company office can be enforced and made prevailing in some or all other Company offices, at the Company's election. If there are variations, therefore, they merely serve to confirm the reservation and exercise of that control which militates for the conclusion that these agents are employees.

Moreover, this particular record makes clear that the Quaker City agents, who had acted together as a Union before the Company took over, have continued to do so thereafter. Agent Scott has acted as the collective spokesman for these agents with the Company. It is clear that these agents have engaged in some concerted activities typical of employees.

To the extent they have had any results, the means has been *collective* action. Collective action—in fact as well as by definition— is the antonym of individual action. Individual action could and would have been taken if these agents were really *independent* contractors. Their record of collective action is thus a factor demonstrating that these agents are not independent contractors but employees.

3. Company Payment of Social Security Taxes.

While the Company has determined it will not withhold federal income taxes on account of these agents or make state workmen's compensation or unemployment compensation payments, it does make social security tax payments for these agents as an employer. A. 704, 884-891, 923-925. The admission that these agents fall within the pertinent statutory provisions evidences that the conditions required by them are in fact characteristic of these agents.

Section 7701(a)(20) of Title 26, U.S.C., provides in pertinent part, "the term 'employee' shall include a full-time life insurance salesman who is considered an employee for the purpose of chapter 21," which embraces Section 3121(d). The pertinent text of the latter provision, which is set out in the footnote,[3] re-

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[3] "(d) Employee.—For purposes of this chapter, the term 'employee' means—* * *

"(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

"(3) any individual (other than an individual who is an employee under paragraph (1) or (2)) who performs services for remuneration for any person— * * *

"(B) as a full-time life insurance salesman; * * * if the contract of service contemplates that substantially all of such services are

quires that to be covered by the law, these agents must either be employees under the usual common law rules under subsection (2) or fulfill the requirements of subsection (3). The latter, in turn, imposes certain requirements which are at variance with any claim that these agents are independent contractors.

Subsection (3) requires, first, that "substantially all of such services are to be performed personally by such individual." To acknowledge that this requirement has been satisfied is to recognize that these agents may not and do not have assistants in any significant sense, and that salaries to assistants for these agents is not any genuine or significant factor in this case. If these agents had any assistants or employees, or if it was contemplated that any assistants or employees would perform any significant part of the services which these agents perform for the Company, this statutory requirement could not possibly be met, and there could be no Company Social Security contributions for these agents.

Moreover, an individual cannot qualify as an "employee" under the statute if he "has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation)." This provides corroboration to the critical fact, already discussed herein, that these agents

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to be performed personally by such individual; except that an individual shall not be included in the term 'employee' under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed."

have made no investment in the facilities which they use.

Further, an individual cannot qualify as an "employee" within 3121(d)(3)(B) if his services "are in the nature of a single transaction not part of a continuing relationship." As to this, the Company concedes that it makes every effort to encourage length of service and a continuing relationship.

In short, the circumstances required for being an "employee" under this particular statute are similar to those for "employee" ordinarily and are true of these agents.

SUMMARY OF ARGUMENT

I

A. The legal category of "independent contractor" was created in the common law to insulate the master from tort liability for wrongful conduct in the course of work done for him by one who was pursuing a separate and independent calling or business. From its very inception the legal category of "independent contractor" included as a vital element the pursuit of an independent business separate and apart from the business organization and operations of the master. Historically, as the concept developed in the law, this characteristic of independent entrepreneurship, which was the factual explanation of the lack of right of control in the master over the work of the independent contractor, became and is most frequently expressed as a "right of control" test; so that the typical statement of the distinction between "employee" and "independent contractor" is whether the master retains the right of control over the work involved.

The concept of "independent merchant", one who depends upon profits—the difference between what he pays for goods, materials and labor and what he receives from the prices he charges—as opposed to one who makes his living from wages or salaries and is an integral part of the employer's organization, was in the mind of Congress when it added the express exception for "independent contractor" to the definition of "employee" in Section 2(3) of the Act. This amendment was a Congressional reaction to the decision of this Court, *Board* v. *Hearst Publications,* 322 U.S. 111 (1944), in which the Court had relied primarily upon the purposes of the Act, and, according to the belief of Congress, had disregarded the ordinary standards of the law of agency.

In its consideration of "independent contractor" in various contexts, this Court has considered the realities of the work relationship and of the consequent right of control. This Court has relied on such factors as whether the workers involved were in fact operating their own independent businesses or were a part of the employer's organization and operations.

B. These agents must be held to be "employees" under any applicable legal test. They are not engaged in their own distinct calling or business, but, rather are an integral element of the Company's organization and business. They have no real bargaining power vis-a-vis the Company. They are not independent merchants. The concept of "profits" is inapposite to their operations: they have no required expenses, they do not buy or sell or own any products, they make no capital investment and have no attributes of an independent profit-making enterprise.

Under the tests of the law of agency, these insurance agents are employees. The Company does retain a right of control over their physical conduct in their work, and exercises that right in present practice by assigning a supervisor to accompany these agents as they work on their debits and by requiring them to report to their district office to which they are assigned one morning each week. Generally, the work of debit insurance agents is done by employees and not independent contractors. There is no particular experience or education required and the Company provides the necessary training to the new agents in how the work shall be done. All the instrumentalities of the work, such as the business office, the insurance policies themselves, the forms and the accumulated policyholders on the debits, are provided by the Company. The agents are full-time employees and the Company shows its interest in retaining them by providing incentives for length of service. The work performed is in the regular business of the Company.

II

A. The Court below misconceived the scope of review open to it under the Act. It failed to recognize that the issue of employee status is essentially one of fact. It believed itself free to follow its own evaluation of the record, without according to the Board any deference for its administrative expertise in applying statutory terms to particular facts. The Court seemed to believe that the test was whether it could find any evidence in the record to reverse the Board rather than the normal test of upholding the Board if there is substantial evidence of the whole record supporting the Board.

B. The Court below misconceived the "right of control" test. It derogated many of the evidences of control upon which the Board had relied, with the assertion that the controls were inherent in the nature of the insurance business. But the right of control test is concerned with whether or not evidences of the right of control exist; the reasons therefor are irrelevant. If the nature of the employer's work is so detailed and integrated that he must retain extensive controls over it, that factor can hardly be disregarded in the law; rather, it is conclusive proof that the relationship must be one of employer-employee. Accordingly, the judgment of the Court below cannot be sustained. The Board's Order is amply sustained by substantial evidence and is entitled to enforcement.

ARGUMENT

I. THESE INSURANCE AGENTS MUST BE LEGALLY CATEGORIZED AS "EMPLOYEES".

A. Applicable Legal Standards.

1. "Independent Contractor" in the common law.

The concept of "independent contractor" came into the common law as an exception to the rule which had been developed that a master was liable to a third party for the negligence of his servant. Its earliest clear expression may be found in *Milligan* v. *Wedge,* 12 Ad. & E. 737, 741-742, 10 L.J.Q. B. 19, 113 Eng. Rep. 993, 994, 995 (1840), which held that one who "has employed another who is recognized by the law as exercising a distinct calling" (Lord Denman, C. J.) is not liable to a third party on account of the torts of a person he has employed—"For, where the person who does the injury exercises an independent employment, the party employing him is clearly not liable." (Williams,

J.); *accord, Quarman* v. *Burnett,* 6 M. & W. 499, 511, 151 Eng. Rep. 509, 514 (1840) in which liability was likewise denied for torts committed by those "who are not the servants of the owners, but who exercise employments on their own account." (Baron Parke); *cf. Laugher* v. *Pointer,* 5 B. & C. 547, 108 Eng. Rep. 204 (1826), in which opinion was divided; and *Bush* v. *Steinman,* 1 B. & P. 404, 126 Eng. Rep. 978 (1799), holding that the master was liable for the torts of a servant of one whom the master had engaged to perform a service. As it came into existence, the concept of independent contractor included the element that the independent contractor would be regularly engaged in an *independent* business or calling. Leidy, "Salesmen As Independent Contractors," 28 Mich. L. Rev. 365, 370 (1930).

> "The independent contractor, conceived as someone engaged in a *separate and independent calling* and exercising that calling while producing an agreed result for the employer, actually did stand in a different conceptual relation to the employer than did the ordinary servant or employee. The difference was that he was in the pursuit of his calling and for this reason the employer did not have control as to the manner of performance. The independent contractor was in what we have called an *'own business'* relationship." Wolfe, "Determination of Employer-Employee Relationships In Social Legislation," 41 Colum. L. Rev. 1015, 1022 (1941) (emphasis added).[4]

As the law developed, however, the routine judicial reference to the ultimate legal criterion was not to the

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[4] See, generally, in addition to the articles cited in the text, *Hilliard* v. *Richardson,* 3 Gray (69 Mass.) 349 (1855); Harper, "The Basis of the Immunity of an Employer of an Independent Contractor," 10 Ind. L. J. 494 (1935); Jacobs, "Are 'Independent Contractors' Really Independent?," 3 De Paul L. Rev. 23 (1953).

"own business" or "independent calling" which produced the lack of right in the master of such control as he would have over a servant, but to the "right of control" conclusion itself. Accordingly, "right of control" has for many years been the capsule statement of the justification for deciding whether or not to hold the master liable for torts committed in doing work he has ordered, and in more recent years, for deciding whether the employer-employee relationship existed for other purposes such as unemployment compensation statutes and similar social or labor legislation. If the ultimate master retained the "right of control" over the work in issue, he was legally the "master" or "employer" and those performing the work were "servants" or "employees". If the ultimate master did not retain the "right of control", those performing the work were categorized as "independent contractors". As this Court stated in *Singer Manufacturing Co.* v. *Rahn,* 132 U.S. 518, 523 (1889),

> "the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.' *Railroad Co.* v. *Hanning,* 15 Wall. 649, 656."

While the "right to control" concept has been frequently repeated, analysis reveals it to be less a test or means for arriving at the ultimate legal judgment than a summary expression of the result itself. Analytically, the statement that the relationship hinges upon the right to control provides no guidance as to the facts or considerations which are pertinent to determining whether that right has been retained. That determination, in turn, depends upon the finding of

facts and the appraisal of the relevancy and relative weight of each fact and fact cluster. The control test thus "seems to fit itself too readily into an *ex post facto* determination of a relationship. * * * In view of the fact that, relationship once determined, control would follow, as an implication of law, the possibility of reasoning in a vicious circle is apparent." Leidy, *op. cit. supra,* at 377-378. The difficulties with the right of control test arise from "the vagueness of the test, resulting both from the lack of agreement or rules on the weight given to various features of the relation, and from the fact that the right of control is itself an inference or conclusion, seldom capable of direct proof." 1A Larson, *The Law of Workmen's Compensation* 657 (1966).

2. "Independent Contractor" in Section 2(3) of the Act.

The original text of the National Labor Relations Act, as it became law in 1935, provided coverage and protection only for those who were "employees". There was no explicit exception for "independent contractors". However, the Board recognized the truism that one who is an "independent contractor" *ipso facto* cannot be an "employee". See, e.g., *Twentieth Century-Fox Film Corp.,* 32 NLRB 717, 732-735 (1941), and cases cited therein; *Philadelphia Record Company,* 69 NLRB 1232 (1946).

This Court considered the issue in *Board* v. *Hearst Publications,* 322 U.S. 111 (1944). The Board had found that the newsboys involved were employees; the Court of Appeals had reversed and declared them to be independent contractors. This Court addressed itself at the outset to the contention that "common-law standards" must be the only basis for decision; and

rejected that contention principally on the ground that Congress had not intended that the legal coverage of the Act could vary according to the common law of each individual state, but had provided a labor law uniformly effective throughout the nation. *Id.* at 120-124. In his dissent, Mr. Justice Roberts did not dispute this conclusion, but contended, "As a result of common law development, many prescriptions of federal statutes take on meaning which is uniformly ascribed to them by the federal courts, irrespective of local variance." *Id.* at 136. The Court then primarily considered the "history, terms and purposes of the legislation", *id.* at 124, and the fact that the enforcement and adjudication under the Act had been assigned to an expert Board, *id.* at 130-132, as the foundation for its judgment that the newsboys were employees.

The *Hearst* decision triggered a Congressional reaction, when the Labor Management Relations Act was enacted in 1947, resulting in the addition of an explicit exception for "independent contractor" in Section 2(3) of the Act. "The effect of this provision was to overrule *Labor Board* v. *Hearst Publications,* 322 U.S. 111." *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 481, n. 10 (1964).

According to the Report of the House Committee on Education and Labor, the *Hearst* case involved "independent merchants". H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess. 18, as reprinted in *Legislative History of the Labor Management Relations Act, 1947,* 309 (1948). These independent merchants "bought newspapers from the publisher and hired people to sell them * * *." *Ibid.* This Report continued:

> "In the law, there has always been a difference, and a big difference, between 'employees' and 'in-

> dependent contractors'. 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive from the end result, that is, upon profits." *Ibid.*

According to the Conference Report, *Hearst* "held that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were 'employees' within the meaning of the Labor Act. Consequently it [this Court] refused to consider the question of whether certain categories of persons whom the Board had deemed to be 'employees' were not in fact and in law independent contractors." House Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess. 32-33, *id.* at 536-537.

Clearly, all that Congress objected to was what it described as the Court's completely ignoring ordinary legal tests. Congress hardly intended that any issue of employee-independent contractor under the Act should be determined without any reference to the purposes of the Act—so long as the ordinary legal tests were also considered. It is noteworthy that the Court of Appeals decision in the *Hearst* case, which Congress obviously approved, defined the criterion it applied as follows:

> "Since the term employee is not defined in the Act, we agree with petitioners' contention that it must be given its conventional meaning as developed under the common law *and statutory enactments.* Such a result is in accord with the basic

theory of statutory interpretation that the legislature is presumed to use words in their ordinary sense unless that sense is contradicted by the context of a statute." *Hearst Publications* v. *National Labor Relations Board,* 136 F.2d 608, 612 (9 Cir. 1943) (emphasis added).

3. "Independent Contractor" in the decisions of this Court.

This Court has emphasized that the determination of employee or independent contractor should reflect consideration of the realities of the work relationship involved and of the consequent right of control in the light of the particular issue before the Court. In *Goldberg* v. *Whitaker House Coop.,* 366 U.S. 28, 32 (1961), for example, the Court upheld an administrative determination that the members of a cooperative were "employees" of the cooperative for the purposes of the Fair Labor Standards Act; and relied essentially upon the following factors:

> "The members are not self-employed; nor are they independent, selling their products on the market for whatever price they can command. They are regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates. Apart from formal differences, they are engaged in the same work they would be doing whatever the outlet for their products. The management fixes the piece rates at which they work; the management can expel them for substandard work or for failure to obey the regulations. The management, in other words, can hire or fire the homeworkers." *Id.* at 32-33 (footnotes omitted).

In *United States* v. *Silk,* 331 U.S. 704 (1947), involving the Social Security Act, the Court similarly relied on the realities of the work relationship involved.

In holding that certain of the driver-owners were independent contractors, the Court held that "where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors." *Id.* at 719 (footnote omitted).

In holding the unloaders to be employees, this Court pointed out:

> "They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business." *Id.* at 717-718.

B. These Agents Are "Employees" in Accordance With the Applicable Legal Standards.

1. Common Law.

These agents must be held to be "employees" under any applicable legal standard. They are not engaged in their own distinct calling or business. Quite the reverse, they are an integral element in the Company's organization and hierarchy. They are not in an "own business" relationship but are in the Company's business, dealing with the Company's policies, reporting to the Company's assistant managers and managers, and generally subject to the Company's rules and phys-

ical supervision. The Company retains the right of control not only over what shall be done but how it shall be done.

2. Congressional Statements.

These agents are not "independent merchants." They do not buy any products for resale on their own account. They never have title to or dominion over the Company's insurance policies. They hire no people to sell those policies. They work for commission salaries under direct supervision. They do not do a job for a price, but devote full time to the Company's work and depend upon their job as agent with the Company for their livelihood. As they have no expenses for goods, material or labor, or any required expenses whatever for that matter, the entire concept of "profits" is utterly inapposite.

3. Law of Agency.

These agents are employees under the ordinary tests of the law of agency. As they appear in the *Restatement,*[5] those tests would focus principally upon the following matters of fact:

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[5] "§ 220. Definition of Servant

"(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

"(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

"(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

"(b) whether or not the one employed is engaged in a distinct occupation or business;

"(c) the kind of occupation, with reference to whether,

a. *Extent Of Control.* Most of the facts of record in this case evidence that the actual understanding and agreement, as it is routinely practiced in real life by these agents on the one hand and the Company on the other, clearly lodge the right of control over the details of the agents' work with the Company.[6] The Company does retain a right of control over the physical conduct of the agents in the performance of the services which they render the Company (pp. 11-19, *supra*). None of these agents "has the power to make his own rules and plans of handling the Company's business" and must "operate in accordance with the Company's plans." A. 609-610, 1120, pp. 29-30,

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in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

"(d) the skill required in the particular occupation;

"(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

"(f) the length of time for which the person is employed;

"(g) the method of payment, whether by the time or by the job;

"(h) whether or not the work is a part of the regular business of the employer;

"(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business."

Restatement of the Law of Agency 2d 485-486 (1958) (hereinafter cited as "*Restatement*").

[6] According to the *Restatement*, "the control or right to control needed to establish the relation of master and servant may be very attenuated. In some types of cases which involve persons customarily considered as servants, there may even be an understanding that the employer shall not exercise control. Thus, the full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking." *Id.* at 847.

supra. The only written agreement between the parties is the Agent's Commission Plan, A. 1051-1059, which was drafted and is subject to change by the Company unilaterally (pp. 25-27, *supra*). The Company provides each of these agents with a Rate Book which consists of controls over the details of their work. A. 1068-1096.

b. *Distinct Occupation or Business.* If there is one thing that emerges unmistakably clear from this record, it is that these agents are not engaged in a distinct calling or business of their own, apart from the Company, but are, rather, engaged in the occupation, calling or business of the Company.

c. *How Work Is Usually Done.* The occupation of debit agent is usually done under the direction of an employer in a relationship viewed by the law as employer-employee. This is demonstrated by common law decisions, decisions of the Board and studies of the insurance industry.

In *Chatelain* v. *Thackeray*, 98 Utah 525, 534, 543, 548, 100 P.2d 191, 195, 199, 201 (1940), for example, holding an insurance company vicariously liable in tort for the negligence of one of its debit agents, the Court found that the agent "was at liberty to go anywhere, at any time, and by what means he pleased, to sell insurance. Being paid upon a commission basis, however, it was to his interest and to the interest of appellant [the insurance company] for him to sell as many policies as possible. * * * It is to be noted in this connection [in applying the right of control test] that it is not actual interference in the work that denotes the agency, it is the right to interfere that makes the difference between an independent contractor and a servant or agent. * * * Neither the fact that [the agent]

was paid solely upon a commission basis, nor that he used his own automobile and personally paid the expenses of the operation thereof, is controlling in determining when the relationship of employee exists." *Accord: Atlanta Life Insurance Company* v. *Stanley,* 276 Ala. 642, 165 So.2d 731 (1964); *Richards* v. *Metropolitan Life Ins. Co.,* 19 Cal. 2d 236, 120 P.2d 650 (1941); *Dillon* v. *Prudential Ins. Co. of America,* 75 Cal. App. 266, 242 Pac. 736 (1925); *Martin* v. *State Farm Mutual Automobile Ins. Co.,* 108 So.2d 21 (Ct. App. La. 1958); *Gillespie* v. *Ford,* 225 S.C. 104, 81 S.E.2d 44 (1954); *Fidelity Union Life Ins. Co.* v. *McGinnis,* 62 S.W.2d 186 (Civ.App. Tex. 1933); cases holding insurance agents to be "employees" under statutes include: *Industrial Com.* v. *Northwestern Co.,* 103 Colo. 550, 88 P.2d 560 (1939); *Review Board of U. Comp., etc.* v. *Mammoth L. & A. Ins. Co.,* 111 Ind. App. 660, 42 N.E.2d 379 (1942); *Unemployment Compensation Com.* v. *Ins. Co.,* 215 N.C. 479, 2 S.E.2d 584 (1939); *Superior Life, & c., Co.* v. *Board of Review, & c.,* 127 N.J.L. 537, 23 A.2d 806 (1942); *Superior Ins. Co., Ap.,* v. *Unemp. Comp. Bd.,* 148 Pa. Super. 307, 25 A.2d 88 (1942); *Carter's Deps.* v. *Pal. St. Ins. Co.,* 209 S.C. 67, 38 S.E.2d 905 (1946); *Life & Casualty Co.* v. *U.C.C.,* 178 Va. 46, 16 S.E.2d 357 (1941).

The decision below cannot be reconciled with the following analysis in *Capital Life & Health Ins. Co.* v. *Bowers,* 186 F.2d 943, 945 (4 Cir. 1951) (footnotes omitted):

> "The contention is that the agents were not employees of the company but had the status of independent contractors at common law, in that they were free from the control of the company in doing the work for which they were paid. It is pointed out that the commission agents were not

required to report to the office daily and that although they were expected to collect the premiums in the area assigned to them, and also to write new business to offset lapsed policies, they were free to go to work when they pleased and to write new business when and where they pleased, in or outside that area. It is urged in short that they were subject to no requirements except to be honest and accurate and to conduct themselves in accordance with the law of South Carolina, and that therefore they have that freedom of action which characterizes the status of an independent contractor and is illustrated in numerous cases.

"There are similarities in certain respects between the facts of these cases and the facts of the case at bar, but when all the circumstances of the present controversy are examined, it becomes obvious that the seeming freedom from control of the commission agents is lacking in reality, and that they are in fact as completely subject in all material respects to company direction as the salaried agents whose employee status under the statute is not questioned. Long experience of the taxpayer and other companies in this field has resulted in the adoption of methods and forms best suited to the business which leave little discretion to the agents, while the diligence and industry required to collect the small weekly premiums on hundreds of policies and to write new business to keep the debit at a proper volume compel the agent to spend so much time in his debit area and to report his activities and account for his collections at the office so frequently as to leave him little freedom of action. It follows that the judgment of the District Court should be affirmed insofar as it rejected the claim [that the agents were independent contractors]."

Typical findings about debit insurance agents, made by the Board in legal contexts addressed to other issues

than employee-independent contractor, demonstrate the close similarity between the debit agents' work, whatever the company, and the characteristics of the work of the agents involved in this case. As to the debit agents employed by The Prudential Insurance Company of America, for example, the Board found, "The employees here involved are insurance agents, not factory production workers. Their general duties are to sell and service insurance policies. No particular time or place for such employee services are required by the employer." *Insurance Agents' International Union,* 119 NLRB 768, 783 (1957), *reversed on other grounds,* 104 U.S. App. D.C. 218, 260 F. 2d 736 (1958), *affirmed,* 361 U.S. 477 (1960). In *Metropolitan Life Insurance Company,* 138 NLRB 512, 514 (1962), also, the Board found, "Most of a debit agent's time is spent away from the office." The similarities among debit insurance agents are such that the Board has fashioned general principles of appropriate bargaining unit determination applicable to such agents. *Metropolitan Life Insurance Company,* 156 NLRB 1408 (1966), *upon remand, Metropolitan Life Ins. Co.* v. *Labor Board,* 380 U.S. 438 (1965); *Quaker City Life Ins. Co.,* 134 NLRB 960 (1961), *enforced,* 319 F. 2d 690 (4 Cir. 1963).

Students of the insurance industry have pointed out that the hallmark of the debit or industrial insurance business, in contrast to the ordinary insurance business with which the Court is perhaps more familiar, is that in the debit business the regular premiums are collected at the policyholders' home by an agent. The characteristic of the debit agent's job which distinguishes it from that of other insurance agents is that his duties include regular visitation of the policy-

holders, generally at their homes, and collection by him as agent—rather than remittance directly by the policyholder to the Home Office—of the recurring premiums. This function of regular visitation and collection, involving as it does hundreds of homes each week or month, with innumerable paper transactions to account for the monies collected and the other phases of the work, is invariably, out of practical necessity, carried out on a territorial basis, centered geographically on the group of policyholders the Company finds it economical to service through one field office.

"Combination companies [those which sell industrial or debit insurance as well as others] organize their sales force on the branch office or district office system rather than the general agency system. Since managers * * * assistant managers and agents as well as clerical personnel are appointed by the company, the branch office system will enable the home office to achieve a higher degree of uniformity in sales operations and service to policyowners." R. W. Lederer, *Home Office and Field Agency Organization—Life* 235 (Life Office Management Association; Rev. ed. 1966). A field force organization based on the district office is invariable in the industrial or debit insurance business, M. E. Davis, an active insurance executive, pointed out in his article, "Modern Industrial Life Insurance," in David McCahan, *Life Insurance Trends in Mid-Century* 115, 122 (1950), because "This permits a more direct contact between the management at the home office and the individual agent, and a direct control of the many detailed field services that are required in connection with this branch of the business."

"A strict system of supervision is necessary in the industrial insurance field in order to make sure that

each agent is performing his task properly." Maurice Taylor, *The Social Cost of Industrial Insurance* 114 (1933). It remains true, as written by insurance company executive F. L. Hoffman, "Industrial Life Insurance," in H. P. Dunham, *The Business of Insurance*, vol. 1, 468 (1912), that:

> "It has been properly said that success in industrial insurance is largely a question of effective supervision and painstaking attention to matters of detail. Accordingly the field organization has been developed with a due regard to almost perfect oversight and office control over the activity and business results of individual agents and the supervising field officials * * *. The fact that premiums are required to be collected weekly in the most systematic manner from the houses of the insured involves the necessity of employing agents * * * and their effective supervision throughout practically every working hour of the week."

d. *Skill Required.* The level of skill required in this particular work is shown by the facts that no particular education or experience is required to be employed as an agent and the Company provides all the training required (pp. 22-24, *supra*).

e. *Instrumentalities, Tools And Place Of Work.* The Company alone provides whatever instrumentalities and tools are required in the agents' work: the accumulated policyholders; the insurance policies; the sales promotion literature; the forms; the Rate Book. The Company likewise alone provides the place of work, whether that be considered the district office of the Company or the debit area which the Company gives and assigns to the agent. The place of the agent's employment covers "the entire territory in which he solicited insurance, as well as the company's

office." *Richards* v. *Metropolitan Life Ins. Co., supra,* 19 Cal.2d at 242, 120 P.2d at 654.

f. *Length Of Time.* This is a long run, or permanent, and not an *ad hoc,* relationship (p. 11, *supra*).

g. *Method Of Payment.* The method of payment is dictated unilaterally by the Company (pp. 25-29, *supra*). The Company has provided that the basic compensation is by commission related to money collected and new policies sold. This may not be considered payment "by the job" in the truly independent contractor sense. "Of course, in a sense, each policy of insurance sold or each thousand feet of lumber hauled is a complete project, but this is not the essential character of the service when it is understood that the work is to be continuous for an indefinite period." Larson, *op. cit. supra,* at 648.

h. *Regular Business Of The Employer.* The work performed by these agents is patently a part of the regular business of the employer. These agents are an integral and inseparable part of the Company's organization and operations (pp. 10-11, *supra*).

i. *Belief Of Parties.* The record shows that the parties are divided as to whether they believe they are working in an employee or independent contractor situation, whereas the Company states it believes the relationship is one of independent contractors. Certainly the legal characterization put forward unilaterally by the employer does not aid in resolving the issue. "Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act." *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 729 (1947).

j. *Principal In Business.* There can be no question that the Company is in the insurance business as a principal.

In the light of these factors set out in the *Restatement,* these agents must be held to be employees.

4. Decisions of This Court.

It is true in this case, as it was in *Goldberg* v. *Whitaker House Coop., supra,* that the workers whose status is in issue are not self-employed; nor are they independent, selling their products on the market for whatever price they can command. They are regimented under one organization, the Company, selling what the Company desires to market and receiving what the Company dictates. The Company management fixes the commission rates at which they work; it can compel their resignation for substandard work or for failure to obey the Company rules and policies. The Company, in other words, can hire or fire these agents.

Unlike the driver-owners who were held to be independent contractors in *United States* v. *Silk, supra,* these agents are not small businessmen. They do not own any of the instrumentalities or property utilized in the business; they have made none of the required investment. They do not hire any employees. They do not undertake any economic risk other than losing their jobs. They are subject to Company control. And they have no opportunity for "profit". Like those held to be employees in the *Silk* case, these agents provide only themselves. They have no opportunity to gain or lose except from the work which they do on their debits and from utilizing the Company resources and investment. These agents work regularly in the course of the employer's trade or business.

The factual touchstones upon which this Court has relied in its decisions militates for the judgment of "employee" in this case.

II. THE COURT BELOW MISCONCEIVED THE APPLICABLE LEGAL STANDARDS.

A. The Court Below Misconceived the Scope of Review Open to It Under the Act.

The Court below manifestly believed that it was in a position to re-evaluate the relative weight of the facts as found by the Board and thus to determine the issue as though the Board had rendered no decision that these agents were employees. The Court evidently assumed the issue to be one purely of law. It clearly disregarded the principle applicable to cases involving employment status that "it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation." *Restatement* 486-487.

Similarly, the Court below overlooked the well-established and reiterated principle that a Court of Appeals "may not 'displace the Board's choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*.' [*Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474 (1951)] at 488. * * * But the Examiner * * * sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records." *Labor Board* v. *Walton Mfg. Co.,* 369 U.S. 404, 405, 408 (1962).

The Court below assumed that the nature of the issue afforded it some wider than normal scope for promulgating its own view of how the Act should be interpreted rather than the Board's. It failed to recog-

nize that in the application and interpretation of the provisions of the Act, expressly including the definition of "employee" in Section 2(3), it was bound to observe "the usual deference to Board expertise in applying statutory terms to particular facts." *Hanna Mining* v. *Marine Engineers,* 382 U.S. 181, 190 (1965).[7]

In truth, the Court, while adopting the rubric of the "substantial evidence" test—whether there is substantial evidence to *support* the Board's findings—made clear that its review was directed instead to finding factors "consistent with an independent contractor status" (371 F.2d at 322, A. 1239)—to searching for some plausible grounds for overturning the Board's findings. This is at the polar extreme from

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[7] So far was the Court below from according any requisite deference to the Board that it declared that the Trial Examiner's incidental dictum about off-stand demeanor, which he had expressly stated he was not relying on, for he relied on "the other and *themselves sufficient* bases for my findings," 154 NLRB at 48, A. 1151 (emphasis added), and which the Board had expressly disavowed, *id.* at 38, n. 2, 1200, n. 2, revealed the record "undesignedly" to be "tainted with a flavor which precludes us from conscientiously relying upon it as adequately supporting the Board's determination and order." 371 F.2d at 324, A. 1243. This refusal to permit the Board to specify the record it was relying on, in limitation of the facts relied upon by the Examiner, is opposed to sound administrative practice and to the law. *Cf. N.L.R.B.* v. *American Federation of Television and Radio Artists,* 285 F. 2d 902, 903 (6 Cir. 1961). Inasmuch as the Board certainly has the power to overturn a finding of the Examiner, where the evidence which the Board relies on its sufficient to support its decision, e.g., *N.L.R.B.* v. *Johnson,* 310 F.2d 550 (6 Cir. 1962); *N.L.R.B.* v. *Jackson Maintenance Corp.,* 283 F.2d 569 (2 Cir. 1960), *a fortiori* the Board may uphold an Examiner's finding upon exclusion of a miniscule portion of arguably admissible evidence which the Examiner considered, all of the evidence of record remaining and amply supporting the Board decision.

that limited scope of judicial review of essentially factual findings of the Board demanded by the plain terms of the Act and the many decisions of this Court.

B. The Court Below Misconceived the "Right of Control Test".

While purporting to apply the "right to control" test, the Court patently misapplied it by derogating many of the evidences of the exercise and reservation of the right of control, with the assertion that the controls upon which the Board relied were inherent in the nature of the business. For example, the Court swept to one side all the evidences of control which were admittedly supported by substantial evidence with the following observation:

> "They are not indicative of an existence or exercise of control directed to the 'manner and means' by which the result to be produced by the agent is to be accomplished, but only of the application of those financial controls, accounting procedures, and business methods and practices which would appear to be normal to the operation of the premium collection phase of the Company's business whether it be carried on through debit agents who are employees or who are independent contractors." 371 F.2d at 322, A. 1239.

Likewise, the Court disregarded the evidence that Company control was required for transfer on the ground that "Both from the standpoint of the extent of the area in which an agent is to have responsibility for premium collections, and for the purpose of financial accounting with the agent, Company concern with such transfers and its need for knowledge of the same is readily apparent." *Id.* at 323, A. 1240. Identically, the Court denied probative force to the evidence that

the assistant managers accompany the agents and service the agents' debits when their agents are absent, upon its statement that:

> "The Company is entitled to insist that the debit be adequately serviced and that a proper accounting of premiums collected be made whether such servicing and collection is carried on through employees or independent contractors. Inadequate results or failure in monetary remittance to the Company would in the absence of corrective action require termination of the relationship in either case." *Id.* at 323, A. 1240-1241.

To give one more illustration of the Court's view of the right of control test, the requirement that these agents report weekly to the office and attend sales meetings was thus asserted to be neutralized in legal effect:

> "The continuity of the relationship involved and the mutual interest of the parties in the result to be obtained make it imperative that the agents be kept informed with respect to changes in the insurance contracts the Company offers and desirable that they be made aware of incentive programs sponsored by the Company to stimulate sales efforts." *Id.* at 323, A. 1241.

The vice in the Court's view is that all the facts are manifest evidences of the right of control and thus must be taken into account in any proper application of the right of control test. They may not be disregarded for any reason. The law is concerned with whether these evidences of the right to control do or do not exist in fact; and not with the reason for their existence. If the right of control exists in fact, it is dispositive in law. That the right to control *must* exist in some industry or occupation cannot be rendered

neutral in law; it is the dispositive proof that the employment relationship exists in accordance with the right of control test.

If "the whole project involved many interdependent details, the control of any one of which could not be surrendered without disorganization of the whole", this is a decisive circumstance militating for the conclusion of "employee". *Pennsylvania R. Co.* v. *Barlion,* 172 F.2d 710, 712 (6 Cir. 1949); *Pennsylvania R. Co.* v. *Roth,* 163 F.2d 161 (6 Cir. 1947). What is decisive is "the question whether the work is part of the employer's regular business or operation. When loading, trucking, and the like have to be keyed in with the integral production pattern, the modern tendency is to infer that the employer must necessarily have reserved the right to control as many details as are necessary to keep all the gears in his production machine smoothly meshed together." Larson, *op cit. supra,* at 642. In this case, the whole project of accomplishing the debit agents' work for the Company may well inevitably require close controls (see pp. 61-62, *supra*). In this case, the collections, sales conduct of the business in compliance with the state insurance laws and with the rules and the supervision of the Company, and like factors have to be keyed together; and the Company must necessarily have reserved the right to control all the details necessary to keep its debit operations smoothly producing and meshed together. For precisely these reasons these agents are employees.

CONCLUSION

For the reasons stated herein, the judgment of the Court below should be reversed and the Order of the Board should be enforced.

Respectfully submitted,

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APPENDIX

Statutory Provisions Involved

National Labor Relations Act, as amended, 29 U.S.C. §§ 141 et seq.:

Section 2.(3), 29 U.S.C. § 152(3)

Sec. 2. When used in this Act— • • •

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Section 7, 29 U.S.C. § 157

Sec. 7. Employees shall have the right to self-organizatio, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8.(a)(1)(5), 29 U.S.C. §158(a)(1)(5)

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 10.(e) and (f), 29 U.S.C. § 160(e) and (f)

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the

Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in

the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.